Supreme Court, U.S.
FILED
JAN 10 2005
OFFICE OF THE CLERK

No. 04-739

In The
SUPREME COURT of the UNITED STATES

GERALDINE MILLS, M.D.

Petitioner

v.

PATRICIA A. NOLAN, M.D., M.P.H.,DIRECTOR
DEPARTMENT OF HEALTH

Respondent

On Petition For Writ of Certiorari
To The Supreme Court Of Rhode Island

# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# INTRODUCTION

The Decision of the Rhode Island Supreme Court should not be allowed to stand because it incorrectly suggests, by its arbitrary denial of Appellant's appeal, that Medical Boards of Licensure may upon official whim deprive a physician or for that matter any citizen of their constitutional right to have a "protected property interest in licenses granted to them by governmental agencies."

Respondent's Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted, because it accurately identified the crucial issues and illustrates not only the confusion surrounding the proper standard of review but is representative of the actionable misconduct of one individual. This Court should directly address the application of the Equal Protection Clause and that of Due Process to the plight of all physicians at the mercy of Medical Licensing Board sham reviews.

## REASONS FOR GRANTING THE WRIT

### I..THE EXCLUSION OF A PERSON FROM PRACTICE OF OCCUPATION IN MANNER OR FOR REASONS THAT CONTRAVENE DUE PROCESS OR EQUAL PROTECTION OF THE FOURTEENTH AMENDMENT

Petitioner asks this Court to articulate the Equal Protection standards that apply to all citizens of these United States to have a "protected property interest" in licenses granted to them by governmental agencies. In Schware v Board of Bar Examiners 353 U.S. 232, 238-239,77 S. Ct. 752,756, 1 L. Ed 2d 796,801 (1957) it reads, "the state cannot exclude a person from practice of law or any other occupation in manner or for reasons that contravene due process or equal protection clause of fourteenth amendment."(U.S.Const amend XIV).RI Supreme Court furthers that the "procedural safeguards that must constitutionally attend the granting and revoking of licenses follows no certain formula and due process within administrative

procedures requires opportunity to be heard in a meaningful and timely manner. Due process cannot tolerate a licensing system that makes privilege of doing business dependent on official whim."Millett v Hoisting Engineer's Licensing Division 377 A.2d (1977)Regardless of the agency's motivations, violations of law render actions of the governmental agency defective and violate due process requirements of the United States Constitution. Sections of RIGL violated cited in Table of Authorities, each goes to establish same issue of denying equal protection and due process. 1)State denies certain citizens right to NOT release medical records unless signed for, allows others right to do so (state and federal question-HPAA controls, 2) altering of original written complaints as aided by state 3) reporting suspicions of child abuse to state agency mandated by all citizens when belief is incidents to be not of accidental means; all states have similar laws-fundamental rights 4) denying subpoena of NEAR SIDS records (NEAR SIDS presented at hearing) makes everything testified to, mere conjecture on anyone's part-denies right to fair defense 5) ("court")decision on hearsay evidence @ pg 29 "gives great leeway in administrative hearings(teen's statements did not unfairly bias proceedings) denied equal protection when same hearsay rules not applied to her(Appellant's patient complaints, DEM Campbell/Sullivan re: contamination)6) use of term "antisemitism" and fabrication of stories in which to incorporate term - discrimination based on "race, creed, and religion" violating First Amendment/Civil rights Act (Russo denied claims) 7) denying Mills right to see own mental or medical health records8)subpoena of RIH application (voluntarily withdrawn on advice of Chief Officer of board Milton Hamolsky, M.D. due to unlawful tampering, discrimination). Written agreement that application is to "never be used for any purpose"(signed by all parties as "received") breached by RIH violates HCQIA where RIH failed to report denial if appeal not taken. (Now allege not a "contract" so released it 5 years later to very board Mills reported injustice to (1994); denied resume as evidence(part of application); in keeping Appellant off staff at RIH, but on staff at St Joseph,

RIH violates Sherman Antitrust Act (Appellant's former Chief Alfred Toselli admits " I personally kept her off staff at RIH.") Patrick v Burgett 486 US 94, 108 S. Ct 1658 reads, "state officials do not have the exercise of power to review private parties particular anti competitive acts and to disapprove of those that fail to accord with state policy" 9)determination of "unprofessional conduct" based on inability to use offices contaminated by hazardous substances ( then determine Mills will not be allowed to submit reports on contamination)- every citizen should have the right to witnesses and evidence(Conflict of Interest- Attorney General Sheldon Whitehouse represents RI Medical Board/McIntyre and does not allow case of Whitehouse vs Speedy Oil Petroleum, Inc [ the cleanup only begun after Mills determined that there was a 90.6 ppm level of gasoline vapors in her office building then reporting it to DEM State of R.I]) 10) Report to NPDB that Mills has "mental disorder" when no facts on record below to support allegation,11) reporting full indefinite suspension to patients, news, insurance cos, NPDB,Texas Board of Examiners prior to hearing, final decision or agreed upon consent order 12) Medical board's expert witness Robert Eden, M.D. testified without knowledge (ex: "don't remember what it is offhand," re: Williams syndrome, "I do not know," re: whether gasoline vapors in office) S.v.Allen 8N.C. pg 9 " the law requires he who deposes to fact should have means of knowing it...conjecture . opinions .not sufficient." He testified basing opinions on hearsay of layperson(mother's complaint only)Brouillette v Weymouth Shoe 1961 " conclusions based on hearsay objected to" and on medical book(adverse party given no notice of Reddington vs Clayman 1956, " ..no less than 3 days"),used "possibilities" (ex: "possible inappropriate call to DCYF),. State vs Sullivan 1957 "... seek answers in probabilities.."As pediatrician he testified "possibly impaired judgment," (Wharton vs Meyers 1939, " ..physicians ...upon mental capacity no greater weight than ..laymen..") Sanzari vs Rosenfeld 1961 and he would transfer records without signed releases.12) No statutory immunity protects board (RIGL 9-31-1 whereby state waives sovereign immunity in tort(Andrade 1982);

adverse witnesses not immune-act with malice RIGL5-37-1.5

It is actionable misconduct for McIntyre to have threatened Mills with suspension if she did not release records, while fully aware releases had not been signed. Mother testified in 3rd District Court September 21, 2004, McIntyre told her what to do. Defendant's reply @ pg 3 # 15," makes suggestion that McIntyre was a member of the Board;"they state, "at no time did McIntyre participate in any decision making process and never was or will be a member of the board."(See Mills v McIntyre Petition for Writ - board interoffice memos cite McIntyre as "staff member of the board"(transcript March 16, 2001 Justice Silverstein questions McIntyre if he is counsel "for" or "on" the board or both. McIntyre answers, "Yes, I guess both." Do they refer to "decision making"as "final decision"or general decisions throughout process (influence). He did make determinations in many "decision-making processes"1)determine Jerome Rogoff, M.D.(Past Pres Mass Psychiatric Society) "not competent"to evaluate Mills(McIntyre never responded to letter from Mills' counsel requesting if evaluation was ever presented to board and if so how they came to determine that Dr Rogoff was " not competent" to evaluate Mills.2) that it was an "unfounded telephone complaint" of suspicion of child abuse that Mills reported to DCYF (McIntyre theorized call "unfounded" at start of Hearing stating, "it was this last act that led to her temporary suspension," pg 6 T 8/23/00. Though no child abuse expert determined it "unfounded"(Mills denied Dr Alexander as witness and affidavit read, "call to hotline was not out of line and not unreasonable") the board's own expert Eden testified, " there was a possibility that she inappropriately accessed DCYF," but having admitted the old medical records were illegible, he could only see one injury, excluding 16 others he could not read 3) McIntyre made the determination Mills "only" reported a girl who had attained 18years of age.(Record below-original tape recorded call to hotline/transcript/CPS report identify 16 year old as alleged victim). The instant case and petition for Writ is not about Mr McIntyre. Fourteen of twenty two so called "misstatements" in Defendants brief concern McIntyre.

The issue before this Court is the lower court denying Appellant a careful review of the certified record below. Certainly McIntyre has abused his powers, was party to if not sole inventor of the delusional and fabricated distortions of the facts as they exist in this case. The forum for this is the Writ of Certiorari in Mills vs RI Medical Board and McIntyre.

II.FEDERAL QUESTION RULED ON BY STATE-RESPONSE

Defendants repeatedly state in reply brief Appellant did not present her constitutional or federal claim in lower courts. At pg # 9 it reads," failure to pass upon a federal question leads one to assume the omission was due to want of proper presentation in the state court. Unless the aggrieved party before this court shall affirmatively demonstrate otherwise." At pg 12, " if no opinion is written by the highest court it appears that the state court judgment might have rested upon a nonfederal ground this court will decline jurisdiction." This would be plain conjecture, assumption of the thoughts the Justices might have had. Can it be had that one is not to postulate federal questions but must without doubt present them, but on the other hand a court may deny on assumption and conjecture? It is Appellant's belief that the highest state court did not rest upon nonfederal ground or want of proper presentation, but instead for some other agenda. It would be hard pressed to make a decision based on adequate nonfederal ground for state court when violations of equal protection of law and due process run rampant throughout the case. Is it not all conjecture? Moreover, agency's decisions on questions of law are entitled to deference and are subject to De Novo review in both superior and supreme courts. Carmody v R.I. Conflict of Interest Comm 509 A.2d 453 (R.I. 1986) The mere granting of evidence in case of Mills v Board and McIntyre by the highest state court and allowing her oral argument suggests that some other agenda rests here. This Petitioner has not failed to comply with applicable state procedures in making the federal claim. She has not just made general references to the Constitution but clearly in both appeal to lower court and in writ petition to higher state court has identified with specificity and plead the same, both as prose, and with legal representation.

Review of 70 page petition for writ (supplemental statement on record)cites:pg 5 "..not afford her due process and constitutional right to know adversarial witnesses,"@ pg 9 " denial of hearsay while allowing defendants hearsay," @pg 10 "To be afforded same due process..equal protection..prior to taking of individual's property interest; ...not afforded constitutional right to have a full investigation prior...",@ pg 55 " Mills' rights to the confidentiality clause of this act were vioalted-civil rights. They cite, Bayview Towing,Inc v Stevenson 676 A.2d 325TI1996,"he..must state in clear..direct language which specific article,section,clause..alleged...violated."They state Appellant only cited 14th Amendment without specifying equal protection, due process, privileges, immunities. Pleadings were made with specificity, particularity. Unable to address every citation to denial of due process, equal protection of law, civil and constitutional rights, it is heretofore cited 1) @ pg 2 appeal to "court"- standard of review of APA RI Gen Law 42-35-1 et seq (g) 1-6 1) in violation of constitutional or statutory provisions....2) in excess of statutory authority.3) made upon unlawful procedure 4) affected by other error or law and 5) clearly erroneous in view of reliable probative and substantial evidence on record 6) arbitrary or capricious by reason of abuse of discretion and clearly unwarranted. ( also @ pg 14 writ to highest RI court) Cited was 1) Pierce vs Underwood US 487 U.S. 552, 101 L.Ed 2d 490,108 S. Ct. 2541 " there must be adequate relevant evidence so that a reasonable person could accept the evidence as sufficient to support the agency's conclusion." A) mother states,"it's a bizarre statement gasoline vapors"(doctor tested and found), record is devoid of supporting documents because the Board refused to allow Appellant to introduce them. A decision cannot be made by a reasonable person without adequate relevant supporting evidence. Where the credibility determination is irrational Breeden v. Weinberger 493 F.2d 1002 (4th Cir) or agency has misconstrued it, the court may ignore credibility determinations made by agency. Robinson v Workmen's Compensation Appeal Bd 589 A.2d 778 Where Supreme Court finds agency has drawn improper or irrational

inferences from evidence Court will not demur from correcting such errors. Here agency's resolution of factual matters was defective, prejudicial wherein the court may deem it erroneous and reverse as noted in Millerick v. Fascio 384 A.2d 601 R.I. 1978 The record as in (A) was deficient allowing court to vacate administrative decision as being clearly erroneous in view of reliable probative and substantial evidence contained in the whole record. DiPrete v Morsilli 635 A.2d 1155 1994 R.I.( B) Pled to "court" as follows: "Board's decision ridiculed Mills' statements regarding contamination of her office implying it was the result of her imagination or delusion, while at same time state was raising questions about legitimacy of Mills' concerns; its own DEM confirming accuracy of her observations."3M Corp test results 90.6ppm gasoline 2/5/99)Court should have taken notice of its own records revealing a seriously hazardous situation(Attorney General Whitehouse vs Speedy Oil Petroleum,Inc C.A.No: PC00-229.Taking place instead was same Attorney General became counsel for McIntyre/board, denying Mills state's case against Speedy as her evidence while making numerous motions to board/court to reopen for it. Proceedings at board had not closed when 3 motions were placed. During hearing McIntyre denied documents from being submitted(should be duty of AHO).Attorney General denied them based on "is all character witnesses,...will not enlighten panel any further."(Interim Order - Mills v Medical board and McIntyre) The court records contradict the board's rejection of Mills' environmental concerns. In appeal to "court", it reads, " the board points out Mills failed to substantiate the reports of any agencies, but it was the State that bore the burden of proof in these proceedings." The State should have INVESTIGATED its own complaint thoroughly, and inquiry into the records of its own agencies would seem to be a FAIRLY FUNDAMENTAL requirement prior to making accusations of delusion or fabrication against Appellant. This denied her all due process and equal protection stripping her of all democratic principles for which these United States stand.

III .R.I. LAW REGARDING REOPENING FOR EVIDENCE

Defendant submitted Bowerman affidavit in July 2003(Mills' first counsel) after close of discovery yet states this law prohibits one from reopening for new evidence if it was available at time of initial hearing.Am Jur2d1991 adds, "except for good reasons." 1)Bridgeport NEAR SIDS records were not available at hearing -no doctor in RI caring for children ever received them-mother stated they were "lost in the navy."After making DCYF call, Mills learned they are still on microfiche at Bridgeport Hospital (increases suspicion of abuse). As new evidence the "court" should not have denied subpoena of these records because it was information necessary to determine facts on record. As record stands, we do not know cause of apnea-question of abuse,or natural causes. A large part of testimony involved these issues with a record completely devoid of the evidence (all infancy/childhood records).Call to DCYF was about the sister, alleged victim (per CPS report)and reference person. Why did board/court/McIntyre state call was only about a girl who had attained age of 18 years? (Pg 4). Alleged victim had a skull fracture two years after her sister's NEAR SIDS. Further injuries led to epilepsy.(Two adversarial witness families per RIGL 5-37-1.5 Immunity, are not protected due to communications not made in good faith-a) false allegations of stealing Bridgeport medical records, alleging no gasoline vapors, b)tampering with taperecording (RIGL11 35 21)made at office) filing complaints prior to time limitations on activities governed by law 2)Second issue-psychiatric evaluation which McIntyre preapproved May 2002 by agreement with Harwood(was House Speaker),Craven. Mills saw Dr Rogoff who found her competent to practice medicine,to have no psychopathology. New evidence were evals by Drs Seely/Pomm(Florida),Jaeckle(Texas)-denied by "court." RI Supreme Court has allowed evals on record in Mills vs McIntyre(defendants not objecting to motion in oral argument). In Lemoine v Department of Mental Health Retardation 113 RI 285,320 A.2d 611(1974)"statute did not limit authority of superior court to remand administrative appeal to agencies so more evidence could be taken and agency could reevaluate its decision."

## IV. RI STANDARD FOR REVIEW OF ADMINISTRATIVE DECISIONS

First review is by the RI Superior Court per R.I.G.L. 42 35-15. Trial justice is not permitted to substitute his judgment for that of state agency as to weight of evidence on questions of fact. Acknowledging the "court" cannot deliberate on anything which is not part of certified record, can only deliberate on testimony admitted during hearing process, one need only review this record to see that a "careful review with scrutiny"did not take place. Decisions are then subject to further review in RI Supreme Court by way of Writ of Certiorari which was submitted in compliance with the rules on December 5, 2003. Appellant in painstaking detail noted the myriads of citations where the certified record below did not support the conclusions of the "court." RI Supreme Court failed to determine if there was "some" or "any" legally competent evidence to support the lower court in their findings, declining to pose any opinion in the matter (pg 5 not due to lack of proper presentation or nonfederal ground). One need not go outside the certified record in this case to determine the injustice done, deprivation of due process and equal protection of law. Appellant was rebuffed at hearing time and time again by the physician to whom she directed her documents ( those that he himself assisted her in carrying into hearing).A mother testified her infant, seen by a Cardiologist needed no further testing, as informed by doctor. The "court" writes, " no additional tests were needed." Certified record clearly shows Cardiology report @ pgs 18&19 " return visit scheduled for 6 months for repeat EKG." Decision of court is in error and so numerous and significant as to render the board and court's decisions arbitrary and capricious. It cannot be assumed that a fair, just judicial system could have read this certified record and Appellant's Writ of Certiorari and denied it based upon " no federal question existing." The law does read that if the Petitioner can "affirmatively show to contrary," that constitutional issue was presented to state courts, while highest state court failed to expressly pass on question, this Court will have jurisdiction. Rule 14.1 (g) (1) as to particularization of

when, where and how federal questions were raised was presented in writ, in appendix to complaint, and in appeal to lower court. March 1, 2001 a complaint was filed against board and McIntyre (as individual) for misrepresentation, violation of her due process and equal protection of law. RI state courts were very much apprised of the nature and substance of her claim. They stated," it has a flavor of civil rights and administrative appeal." The court determined that allegations of "actionable misconduct ..on the part of people involved , that's civil rights." The court cited Will v Michigan Department of State Police et al 491 US 58;109 S. Cr. 2304 controlled without addressing Governmental Tort Claim Liability Act or the fact that one defendant was an individual. The argument can best be described as confusing and one best decided by this Court. Lower court stated it would be best to wait for the result of Administrative Decision and then " see what the flaws are in it: the claim would be dismissed on pleadings, not on merits of issues as a civil rights case.". With the same attorney general who denied Mills that critical evidence, defendants denied Mills was alleging a violation of a property interest- which she pled precisely as that. Defendants made repeated misrepresentations at hearing. In conclusion, Mills did not bring a case against the board and McIntyre as an "end run" about Administrative Appeal but for violations of due process, equal protection, deprivation of property. It is not necessary to exhaust administrative remedies(Anthony Palazzolo vs RI et al Supreme Court of the United States No-99-2047,2001US LEXIS 4910(June28,2001) It was futile. With no resolution for years, it has left her in financial ruin and having been so egregiously labeled with some "mental disorder," as to deter her from gainful employment. The many procedural problems warrants examination by this court of the constitutionality of the APA and court's decision. Justice Flanders, RI Supreme Court stated, " there is too much bigotry, discrimination and corruption in the RI Judicial system." This Court should grant this petition and directly address the application of the Equal Protection Clause.

Respectfully submitted,

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